SECOND EDITION.

OUR

NATIONAL CONSTITUTION:

ITS ADAPTATION

TO A

STATE OF WAR

OR

INSURRECTION.

A Treatise by the

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PHILADELPHIA:
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1863.

From an Address of Hon. Edward Everett, delivered before the Boston Union Club, Thursday, April 9, 1863.

GENTLEMEN OF THE UNION CLUB:

In that year (1789) the Federal Constitution went into operation in the United States; the great political consummation of the design of Providence in the discovery and settlement of America; the happy framework of some of the wisest and best men that ever lived, intended to effect the extension of civilization in the shortest possible time, over a vast continent lying in a state of nature; to provide a city of refuge for the starving millions of Europe; to prepare the way for the civilization and Christianization of Africa by the return of a portion of her children from the house of bondage, and to combine upon a scale of unprecedented magnitude, the homebred and fireside blessings of small States and local administrations with the security, influence, and power of a great empire. For seventy years it has been working out these great results; it has conferred upon the rapidly increasing population of the country a degree of general prosperity never equalled; it has welcomed the surplus and suffering multitudes of Europe to the enjoyment of a state of well-being never before vouchsafed by Providence to the same extent to the sons of men; and not without the imperfections, and the errors, the woes and, I am sorry to add, the wrongs, which attend all human things, the incidents neither of republics nor of monarchies, but of our common, frail humanity, it has conferred upon more than two generations an amount of good, with an exemption from the sacrifices and trials which have afflicted other States, altogether without a parallel in history.

And now the great question which we have to settle is, shall this mighty aggregate of prosperity perish, or shall it endure? Shall this imperial heritage of blessings descend unimpaired to our posterity, or shall it be ignominiously, profligately thrown away? Shall the territory of the Union, lately so happy under the control and adjustment of the national and State governments, be broken up into miserable fragments, sure to be engaged in constantly recurring border wars; and all lying at the mercy of foreign powers, or shall it preserve its noble integrity under the ægis of the National government? Admit the right of the seceding States to break up the Union at pleasure, nay, of each and every State to do so, and allow them to enforce that right by a successful war;—deny the authority of the Central government to control its members, and how long will it be, before the new Confederacies created by the first disruption, shall be resolved into still smaller fragments, and the continent becomes a vast theatre of civil war, military license, anarchy, and despotism? Better, at whatever cost, by whatever sacrifice, settle the question at once, and settle it forever.

But it may be asked, how can men support the Administration in the conduct of the war, if they do not approve its measures; how, I ask, in return, can any free government carry on a war, if every one is to stand aloof, who does not approve all its measures? That the war must be carried on, till the rebellion is subdued, is the all but unanimous sentiment of the loyal States. It is as much the interest of the South as of the North to hasten this consummation, for she suffers infinitely more than the North by the continuance of the war, and there can be no return to a state of general and permanent prosperity

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OUR NATIONAL CONSTITUTION.

My subject is the adaptation of the Federal Constitution to a state of insurrection.

Hoping that I may succeed in presenting some clear views of the change wrought by war upon this framework of National life, and of the dormant energies it starts into activity, I shall endeavor to remember that a popular lecture demands more than close logic and dry detail.

The transition our country has undergone, is exquisitely painful. Plunged by a wicked rebellion, from a state of peace and high prosperity, into an abyss of ruin, she presents a spectacle unexampled in the past,—save in that rebellion, described in the grand epic of Milton, when the race itself was buried beneath the desolation of the fall.

How blest was the charm in the poet's lines, which, in earlier days, you have repeated with swelling heart and highborn hope:

> "Columbia, Columbia! to glory arise,
> The queen of the world, and the child of the skies!"

And you felt how dear to you was the country that gave you birth, or in whose happy bosom you found an asylum from the wrongs and oppressions of other lands. But if the America of sixty years ago could thus inspire the poet, and furnish to his lay a subject more noble than ever Calliope breathed in heroic numbers, or Homer sang, what was the America of three short years ago, when she proudly stood the cynosure of nations, the home of liberty, and the exemplar of republics!

O, my country! if ever I could wish the fire of genius to light up the dark chambers of my soul, and inspire my heart with the

poet's fervor, as well as the patriot's love, it would be to describe thee as thou wert, and as, to my fond, confiding hope, thou seemedst destined ever to be!

From the pine-clad hills of Maine to the grassy glades of Texas; from the busy marts of the Atlantic to the golden gate of the Pacific,—bearing the fruits of every clime, abounding in the products of every zone,—this delightful home of man spread its vast fields of culture, its exhaustless mines, and its countless avenues of trade, to a busy, a happy, and a prosperous people.

No dream of Utopia ever saw man so favored, or scene so fair. The gifts of Providence, held by no miserly hand, showered down abundance, far above ordinary wants. Never had gaunt, lean-ribbed Famine stalked through the land, calling for hecatombs to appease his hungry sacrifice.

Labor, unlike that of older lands, eking out a scanty subsistence, rewarded here, ever produced a surplus; while the door to learning, wealth, and fame, opened to the humble and the high.

Her commerce whitened every sea, and anchored in every port. Bounding over mountains, leaping oceans, and crossing the Antarctic, her sons overcame every obstacle,—unsealing the closed ports of Japan, sounding the Dead Sea, and laying bare a South Polar continent.

That bright constellation, which sparkled upon the flag of liberty, but emblematized the Union of States; which, planting its first signal station on the crest of Mount Washington, and, pausing for a moment on the tops of the Alleghanies, faltered not until it had spanned a continent, and rested on the the peaks of the Golden State.

So stood this Federal Union in 1860, a synonyme of power, the temple of freedom, and a light to the world, when South Carolina, raging with diabolism, and drunken with passion, frantically cut the golden cord of Union, which bound her to liberty, prosperity, and honor; and like a bark suddenly burst from her moorings, rushed upon the foaming sea of Secession. This was on the 20th day of December, 1860. On the 7th, 11th, 12th, 19th, and 28th of January, 1861, Mississippi, Alabama, Florida, Georgia, and Louisiana, respectively, and Texas on the 1st day of February, passed their ordinances of secession, and plunged into the same frightful gulf of ruin.

On this first day of February, 1861, while the old administration was yet in power, and before the Federal Government had picked up the gauntlet of war, thrown down by Secession, let us pause a moment, to consider the true character of secession, in reference to the Constitution of the United States.

The world is governed by names. Never was a great crime in national life committed under its appropriate appellation, but wicked men have ever sought to dignify or justify it under the name of some virtue. Call it patriotism, call it honor, or glory, or what you will, and veil it under the mild term, *secession;* but before the first day of February, 1861, secession was treason,—treason of the plainest stamp, as defined in the Constitution; its avowed purpose the overthrow of the Government, its accomplishment by force of arms.

"Treason against the United States" (says the Constitution) "shall consist only in *levying war*, against them, or in adhering to their enemies, giving them aid and comfort."

Fortunately, the phrase "levying war" received a settled interpretation in the best days of the republic. In the trial of Aaron Burr, C. J. Marshall held this term to be technical, borrowed from the English statute, and he adds, "It is scarcely conceivable that the term was not employed by the framers of the Constitution in the sense which has been affixed to it by those from whom we borrowed it."

"Levying war," says Lord Hale, in his Pleas of the Crown, "is direct, when the war is levied directly against the Government, with intent to overthrow it; such, for instance, as holding any of the Government's forts or ships, or attacking them, or delivering them up to the rebels through treachery."

In the United States *vs.* Fries, it was said, "If a body of men *conspire* or meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are guilty of a high misdemeanor; but if they proceed to carry such intention into *execution* by *force*, they are then guilty of treason by levying war."

In the trial of the Christiana rioters in this State, Judge Grier, following this early interpretation of the fathers, laid down the law of treason, thus: "That the levying war against the United States is not necessarily to be judged alone by the number and

array of troops. But there must be a conspiracy to resist by force, and an actual resistance by force of arms, or intimidation of numbers. The conspiracy and the insurrection connected with it, must be to effect something of a public nature, to overthrow the Government, or to nullify some law of the United States, and totally to hinder its execution or compel its repeal."

In Bollman's case, C. J. Marshall said, "It is not the intention of the Court to say that no individual can be guilty of this crime, who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and are actually leagued in the general conspiracy, are to be considered traitors."

Thus it becomes clear to the commonest understanding that secession for the avowed purpose of overthrowing the Constitution and authority of the Federal Government in the seceding States, supported by armed troops, and the seizure of forts, arsenals, vessels, and arms, is the act of "levying war," defining treason in the Constitution; and is treason of the plainest stamp, according to the current of judicial decision, from the earliest to the latest days.

In order to display the true character of secession as treason, we have therefore only to ascertain its purpose and the means of its accomplishment.

Fortunately for the discussion, the purpose of secession, is written on its own frontlet. The South Carolina ordinance of secession, after repealing the ordinance ratifying the Constitution in 1788, proceeds thus: "And that the *Union* now subsisting between South Carolina and other States under the name of the United States of America, is hereby *dissolved.*"

Some of the ordinances of secession are more specific. That of Virginia adds: "And they do further declare, that the said Constitution of the United States is no longer binding on any citizen of this State."

Upon the adoption of the South Carolina ordinance, a question immediately arose in the Convention, what is the new status of affairs? Said Mr. Gregg, in debate on this point, "After South

Carolina abrogated the Constitution of the United States, are its laws still in force? I think not. All the laws of Congress fall instantly to the ground on the act of secession."

Said Mr. Calhoun, "We have pulled a temple down that has been built three quarters of a century. We must clear away the rubbish to reconstruct another. We are now houseless and homeless, and we must secure ourselves against the storms."

Accordingly, steps were instantly taken to erect this new temple, this new home, resulting in a Convention of the seceding States at Montgomery, on the 6th of February, 1861, the establishment of a constitutional and provisional Government for the new Confederate States, and the election of Mr. Davis, and Mr. Stephens, as President and Vice-President.

It being the avowed purpose of secession to overthrow the Constitution and Government in the seceding States, and establish the Confederate in their stead, it remains only to look at the means of accomplishment.

The South Carolina ordinance was adopted on the 20th of December, 1860. On the 23d, eighty minute men or Sons of the South arrived at Charleston, and tendered their services to Governor Pickens. On the 24th, the Governor issued his proclamation under the ordinance of secession, declaring South Carolina a separate and sovereign State, with the right to levy war, conclude peace, &c. On the 28th, the palmetto flag was raised over the custom-house and post-office; and the South Carolina troops took possession of Castle Pinckney and Fort Moultrie. On the 29th, the United States revenue cutter "William Aiken" was surrendered to the authorities of the State. At this time the Governor was tendered troops from other parts of South Carolina, and from Georgia and Alabama. On the 31st, the troops took possession of the United States arsenal at Charleston, containing many thousand stands of arms, and large military stores.

On the 3d of January, 1861, troops were despatched by the Governor of North Carolina, to take possession of Fort Macon, the forts at Wilmington, and the arsenal at Fayetteville. On this day Fort Pulaski was seized by the State troops of Georgia. On the 4th, the arsenal at Mobile was taken. On the 5th, Fort Morgan was taken, and garrisoned by Alabama troops. On the 9th, the "Star of the West," carrying provisions and troops to

Fort Sumter, was fired into by the South Carolina State troops, from Morris Island and Fort Moultrie. On the 13th, Fort Barrancas and the Navy Yard at Pensacola were seized. The commandant telegraphed to the Government, "Armed bodies of Florida and Alabama troops appeared before the gates of the Navy Yard, and demanded possession. Having no means of resistance, I surrendered, and hauled down my flag. They are now in possession."

The design of this detail is to exhibit, by numerous facts, admitting of no denial or evasion, that before the middle of January, 1861, the purpose of overthrowing the Constitution, laws, and Government of the United States, was executed by armed force and military means,—by bodies of armed troops, acting under the authority, and throughout the territory of the seceded States, in prosecution of the common design to secede. The detail might be further continued, showing the movement of large bodies of troops, the seizing of public property, vessels, and munitions of war; the building of batteries, planting of cannon, constructing of defences, and all the various means of war.

Thus we have a clear case of *levying war* against the United States, and treason, not on the low grade of a local insurrection, but upon the extraordinary scale of *State* rebellion; not merely to resist or nullify a *law*, but to overturn the Government itself,—a treason, full to the very brim, before Sumter fell, before the new Administration took the reins of power, and before the meeting of the Peace Convention, on the 5th of February, 1861.

I would impress upon every heart, with vivid distinctness, the depth of meaning concealed under this mild word, *Secession;* its avowed purpose, the overthrow of the Constitution; its means of accomplishment, military force; its completeness, before the 1st of February, 1861,—before it could be averted, except by that salutary force, which those then in power thought it better to defer.

There is a turpitude in this attempt to overturn our Government, unequalled in the annals of crime. No intellect can fully conceive its magnitude. Let it run out all the consequences the strongest mind can trace, and it still falls short of the truth.

What can equal that stupendous wickedness, which lays in ruins the fairest fabric of free Government ever reared by mortal hands; when a dissolved Union, a violated Constitution, and a trampled flag, became the signal of intestine strife, of fratricidal war, and a ruin so vast, so comprehensive, so universal, that fancy, in her wildest flight, can scarcely reach its utmost bound?

But secession did not end where we left it. The moving avalanche, thundering down its Alpine steeps, carried with it, and engulfed in its debris, large masses in other States. Congress terminated on the 4th of March, 1861, and the then Administration laid down the reins, without any provision to repel the war thus levied against the Constitution and Federal Union. Sumter soon fell, and the Government *had* to meet the grave question, What powers has the Constitution, under rebellion, to assert its supremacy, repel the war levied against it, coerce traitors into obedience, and resume its authority over the rebellious States?

So long had we been resting in the arms of peace, lulled by dreams of security, and so trifling had been previous attempts at insurrection, that, as a people, we were unconscious of the sleeping powers of the Constitution. It was a state of war, marshalled by a powerfully organized rebellion, and conducted by States, the Constitution was called to encounter; and the question arose, What is its inherent vigor to meet the emergency?

Some of its powers relate to a state of peace, others to a period of war; and the fact first striking the attention of a jurist is, that no correct exposition can be made of the latter, in a frame of mind that looks alone to a state of peace, before the clangor of arms has aroused these dormant energies. It must not be overlooked, that as the war class rises, the peace class necessarily falls; not because they become extinct, but because the inherent vigor of the Constitution itself brings the war powers into play, to meet the exigency, and relaxes the latter, to admit of the free use and full scope of the former.

The two classes, to the extent that they impinge, are inherently contradictory, and cannot be exercised together. For instance, in a time of peace, life, liberty and property are sacred, and cannot be taken away, except by due process of law. Apply these guarantees of peace to a time of war, and they would forbid the

killing of rebels with arms in their hands, taking them prisoner, or capturing their property; nor could treasonable letters and supplies be searched and seized, and the carriers arrested, without warrant. Apply the rules of peace to war, and martial law cannot be declared, no matter where, or what its necessity.

It is, therefore, manifest that when the Constitution gives power to raise armies and navies, organize the militia, and use them to execute the laws, and suppress the insurrection, by its own authority it necessarily suspends the guarantees of peace, as to all persons and obstacles standing in the way of executing the laws, and suppressing the insurrection. If they oppose these powers, whether as rebels in arms, and the property or means they use; or their aiders and abettors performing parts, no matter "how minute or remote from the scene of action," they stand, as it were, on the track of the engine, and it runs them down.

Everything in nature must succumb to greater force. The peace powers of the Constitution were no longer adequate to maintain its supremacy. Officers, executive and judicial, had been expelled from the seceding States, or compelled to yield up their authority. The voice of the magistrate and marshal was lost amid the din of arms.

Force, therefore, was all that was left to the Constitution, as its *defence* and its *remedy*.

This leads to two questions: What is the authority in the Constitution to employ force, and how shall it be applied?

Let us group the powers relating to this point, and we shall see their efficacy better.

The first class is of a negative character, operating by way of prohibition, viz.:

"No State shall enter into any treaty of alliance or *confederation*, grant letters of marque and reprisal, coin money, emit bills of credit," &c. Art. 1, § 10, cl. 1. "No State shall, without the consent of Congress, lay any duty of tonnage, *keep troops* or ships of *war* in time of peace, enter into any *agreement* or compact with *another State*, or with a foreign power, or *engage in war*, unless when actually invaded, or in such imminent danger as will not admit of delay." Ibid., cl. 2.

These negations must be noticed, because all their prohibitions have been infringed by the seceding States, in connection with

the war they have levied against the Federal Government; and have thus contributed in laying a foundation for the exercise of the positive powers of the Constitution.

These are as follow:

"To lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States." Art. 1, § 8, cl. 2.

"To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Ib., cl. 12.

"To raise and support armies," &c. Ib., cl. 13.

"To provide and maintain a navy."

"To make rules for the government and regulation of the land and naval forces." Ib., cl. 15.

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Ib., cl. 16.

"To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States," &c. Ib., cl. 17.

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers; and all powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Ib., cl. 19.

Thus a bare enumeration of the prohibitions of the acts of States leading to combinations to levy war against the United States, and of those powers which enable the United States to provide means, to carry on war, cause the laws to be duly executed, and to suppress insurrections, discloses an authority in the Constitution of the most express and plenary kind, to put down rebellions, whether of *States* or individuals, by force of arms.

Let us now notice the statutes of Congress, passed to carry out these high powers, and vesting in the President the authority to enforce the execution of the laws, and put down insurrections.

The Act of 28th February, 1795, provides that "whenever the laws of the United States shall be *opposed*, or the execution thereof *obstructed* in any State by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal in this act, it shall be lawful

for the President of the United States to call forth the militia of such State, or of any other State or States, as may be necessary to suppress such combination, and to cause the laws to be duly executed."

The Act of 3d March, 1807, provides,—"In all cases of insurrection, or obstruction to the laws, either of the United States, or of any individual State or Territory where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purpose, such part of the land and naval force of the United States as shall be judged necessary, having first observed all the prerequisites of the law on that subject."

In the case of Martin *vs.* Mott (12 Wheaton, 19), the Act of 1795 was passed upon by the Supreme Court of the United States, and it was decided that, under the Constitution and this act, the President is the sole and exclusive judge whether the exigency has arisen to call forth the militia, and his decision is conclusive on all persons.

The provisions of the Constitution relating to the President are these:

His oath of office: "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution." Art. 2, § 1, cl. 8.

"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States." Ibid. § 2, cl. 1.

"He shall take care that the laws be faithfully executed." Ibid. § 3.

To sum up these provisions of the Constitution and laws in a single sentence, we see,—

That, when the laws are obstructed or opposed by combinations too powerful to be suppressed by the ordinary civil process, the President, who is the constitutional head of the army, navy, and militia, and who is constitutionally enjoined by oath to preserve, protect, and defend the Constitution, and to take care that the laws be faithfully executed; is commanded to use the whole

military power of the United States to suppress such combination, and cause the laws to be duly executed; and that he is the sole and exclusive judge of the facts calling the exercise of this power into requisition.

We have seen that treason was complete by the levying war in South Carolina before the 1st day of January, 1861, and a combination too powerful to be suppressed by civil means existed.

It is, therefore, clear that the *duty*, the *power*, and the *means* provided by the Constitution and laws to suppress the insurrection by force of arms were plenary. No Government, however despotic, could confer greater power, or provide better means than the Constitution and laws thus grant to the President; and this (I beg you to mark it) without a single proviso or restriction, or a letter of instruction as to the mode in which he shall proceed.

The insurgents had "levied war." Nothing less than a counter war could repel theirs. The President was bound by Constitution and law to carry on a war to suppress the rebellion.

This brings us to the second question,—How shall the military force be applied? The Constitution and laws here are silent.

They give the injunction, but prescribe no rule or mode of action. The whole is left to the judgment of the President. Nor is this strange. Congress could not foresee all the movements and resorts of the enemy, and those adhering to him; nor the embarrassments attending the measures to subdue him. A war of *force*, from its nature, knows no rules of action, nor how, nor where the force must be used to meet the exigency. Congress cannot foresee the infinite variety of circumstances attending war, and therefore legislated most effectively in vesting in the President the whole power of the Government, and leaving him to act upon the circumstances. Hence the means to be used, and expedients resorted to, in the prosecution of the war to subdue the enemy, and defeat the schemes of his aiders and abettors, from necessity, not of choice, rest exclusively in the sound discretion of the President, subject only to the customary rules of civilized warfare.

The necessities of warfare are often unforeseen, immediate, and controlling. The commander-in-chief, may, therefore, declare martial law, define what is contraband of war between

the enemy and loyal citizens, blockade his ports, capture and destroy his property, arrest those who give him aid and comfort by conveying information or encouragement, stirring up sedition, seducing troops, and hindering military action, and may, in short, resort to every suitable and necessary means demanded by the exigency. The exigency proceeds from the acts of the enemy or his abettors. It is this exigency, therefore, he must meet.

Here it is so many who criticize the powers of the President fall into error, forgetting to trace the source of the war powers he exercises to the Constitution itself. They overlook the fact that the injunctions of the Constitution, and the Acts of Congress in pursuance, are a grant of *express, unlimited,* and *unconditional* authority to use the whole physical force of the nation, according to his own judgment, in quelling traitors, their aiders and abettors, and compelling them to submit to the laws; and that this express grant, without limitation, for a purpose involving the very life of the nation, and the defence and preservation of the Constitution, on every principle of law, logic, and necessity, requires the exercise of all incidental powers necessary to the execution of the main purpose of suppressing the insurrection.

We have now the means of testing every act of the President in this war against rebellion.

Thus, it is the *purpose* of the Constitution, and *his* duty to put down insurrection. To this end, the whole military force is at his command. All the powers incident to the express grant, and essential to its exercise, are vested in him. In the use of these powers he acts according to his own sound discretion, upon the circumstances as they arise, and subject to no restraint, but the customary laws of civilized warfare.

I wish at this point in coming to treat of the controverted acts of the President, to throw in a word of caution as to the province of this lecture. It is not to defend their propriety, but to exhibit their constitutionality. Constitutional power is one thing, the expediency of its exercise is another. I desire therefore, studiously to avoid every field of partisan controversy, in relation to the practice or policy of the Government in making military arrests, suspending the writ of habeas corpus, proclaiming military emancipation, and declaring martial law.

Preliminary to an examination of some of these controverted acts, let me define a little more sharply the difference between the state of constitutional rights, as they exist in a time of peace, and in a period of war. Some are natural, and exist independently of all constitutions: such as life, liberty, property, and the essential means of preserving and protecting them. In time of peace none can be taken away, except by due process of law. But how are they affected by a state of war? The rebels and their abettors are citizens, who owe allegiance, but have cast it off. The civil authority is not adequate to reduce them, and force is resorted to by authority of law.

The Constitution now turns against them, and the rights it guaranteed during peace, it now authorizes to be taken away, if necessary to reduce them to submission. The terrible earnestness of war would be made ludicrous by a rebel in arms quoting the Constitution to his captors. Imagine him sword in one hand, and Constitution in the other, saying, "No one shall be deprived of life, liberty, or property, without due process of law"—"The privilege of the writ of habeas corpus shall not be suspended." But is this quotation any less preposterous, in the mouth of a rebel sympathizer, aider or abettor, who furnishes arms, information, medicines, or aid to the enemy; or paralyses the arm of suppressing force, by discouraging enlistments, counteracting the call of the militia, or by any other act of disloyalty, directly tending to support the cause of the rebels? And what difference does it make where he performs his part, or how minute it is, in this grand drama of ubiquitous treason?

What a solemn mockery is the injunction to "preserve, protect and defend the Constitution," and "to take care that the laws be faithfully executed," if the means of suppressing traitors and rebels, put into the Executive hands by the Constitution and law, may be wrested from his grasp, by some peace-breathing clause of the same Constitution?

The rights of the loyal also yield to the necessities of war. The law-abiding peaceful citizen, must shoulder his musket, and lay down his life upon the battle-field; his liberty is restrained by discipline; his property taken and destroyed for a military purpose. If he appeal to the Constitution, though it frowns not on him, as upon the rebel, in sorrow it turns from him the

mild features of peace, and exposes to view only the grim visage of war.

If then the stern necessity of war may demand the sacrifice of fundamental, God-given rights, what exemption, from the same necessity, can be claimed for the minor guarantees of the Constitution? On what higher foundation rests the freedom of speech and of the press? the right to have due process of law, and the writ of habeas corpus? They are but the outposts set to guard the higher rights of life, liberty, and property.

The necessity which demands the sacrifice of the higher rights, certainly may call for the surrender of the lesser, when public safety and national life demand it. The necessity calls into life and activity the war powers, and these sanction the means necessary to their proper exercise. The requisite means flow therefore logically and incontestably from the Constitution itself.

The necessity is supposed to override the Constitution. But it is not so. The Constitution, recognizing the necessity of force, provides for its employment; and Congress, carrying out the authority, places the whole disposable force of the nation in the hands of the President, without limitation or instruction as to its use, except it be to declare the purpose to suppress insurrection, and cause the laws to be executed. But when the President comes to use the military arm, his *use* depends necessarily on the obstacles and opposition to be overcome; and these constitute the exigency he is called to meet. He must act accordingly.

In acting on the necessity, it is clear, therefore, he acts under the Constitution, and not against it. In judging of the necessity, he exercises a sound discretion. I say *sound* discretion, because whenever the law intrusts its agents with a discretion, it does not clothe them with arbitrary or wilful power.

It means a reasonable discretion, which, judged of by all the attending circumstances, is such as a man of just views and proper motives, must pronounce to be right and fitting to the circumstances.

Every just man, not blinded by sinister motives or incurable bias, in forming his opinion of the soundness of this discretion, will reject partisan clamor, and will make great allowance for the superior opportunities of knowledge of the President, and

the public necessity of suppressing many facts essential to a correct judgment.

The language of the Supreme Court, in Martin *vs.* Mott, is opportune: "It is no answer (say the Court), that such a power may be abused; for there is no power that is not susceptible of abuse. The remedy for this, as well as for all official misconduct, if it should occur, is to be found in the Constitution itself. In a free Government, the danger must be remote, since, in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny."

Thus we have found the true constitutional and legal test of every act of the President, in prosecuting the war. Is it a part of the necessary means used to subdue the rebellion, and cause the laws to be executed, in pursuance of the war powers vested in him? And is it such as a sound discretion should adopt? I use the term *President*, to call attention to the fact that these powers are exercised by him, not merely as Commander-in-chief of the army and navy, but as chief Executive.

His being Commander-in-chief, is but one of the authorities committed to him, while both the Constitution and law commit to him, as President, the duty of taking care that the laws be duly executed, and of repelling invasion and suppressing insurrection. He is made Commander-in-chief but as a means to enable him to execute these duties as President.

In applying the test just mentioned, it must be remembered that war, like private redress, must be judged by its circumstances. There can be no Procrustean rule, to draw every case to its own standard. A father who would cowhide a child of tender years, would overstep the bounds of just punishment. But if his son, almost of age, incorrigibly wayward, and of nearly equal strength, should turn upon him with the fury of a tiger, an excess over ordinary punishment would be sanctioned by the necessity. So this rebellion is not to be judged by rules which apply to a local uprising, or a "Whiskey Insurrection" in Western Pennsylvania. Here one-third of the States and popula-

tion of the Union, occupying a vast territory, separated by passable and much of it by only ideal boundaries, and possessing vast means of warfare, is in arms against the remainder. The rebellion is organized by States, and conducted by a Confederate Government. While the number of men and means of warfare are so much greater in the North, these are countervailed by the magnitude and difficulty of the field of operations, and the impossibility of concentration to a decisive result.

So wide, so extensive, so numerous these operations, no capacity can grasp, combine, and carry forward their details; no human foresight can provide for derangement of plans, and unexpected defeat of their execution. The South is full of mountains, defiles, and unfordable rivers, yet possesses a vast system of railroads adapted to successful defence. The whole South, by this means, concentrating upon Richmond as a centre, or rather one of the foci of an ellipse, stands ever ready to invade, as well as to repel. The Confederate Government sits there, like a spider in the midst of its web, ready to run to the point of disturbance, as often as the vibrating filament gives notice of approach. North and South touch on thousands of miles of coterminous territory, rendering illicit intercourse easy, indeed, impossible of restraint.

The population of the two sections is intertwined by numerous ties of blood, interest, opinion, and sympathy, filling the North with men of Southern birth and education, and with persons of strong bias towards the South. Many of the alleged grievances of the South have been subjects of bitter strife and partisan discussion, in which men of the North have vied with those of the South. The very Departments of Government have been polluted in their inmost recesses, by disloyalty and secret treason.

This is but a brief and faint outline of the difficulties to be met and overcome, in the exercise of the power to quell the rebellion. No wonder it seems to be impossible nearly, and the nation must begin to discover the magnitude of the task, cast upon a single mind, which yet, no matter how aided by counsel and numbers, must superintend and be held responsible for all.

The enemy has constant information of our armies, their numbers, movements, and designs. This cannot be arrested upon

thousands of miles of contiguous territory, with an imprudent, sometimes vicious press; with men of rebel sympathies, and many actual spies and traitors to overstep them. What civil process will remedy the evil, and avert the danger? What civil prosecution will operate by *precaution* or *prevention*, to save us from defeat and disaster; admitting even, that it might "drag its slow length along" to *punishment*. Our brave soldiers fight well, but they are led to ruin and to sacrifice. They move, but the Richmond spider forewarned, runs from his centre, and meets them at every outer thread of his dangerous web.

Must the Government be ever thus exposed to the machinations of secret sympathy and treason? Must the wheels of war be blocked at every step? Then what remains but to restrain these acts by military means. There must be a power to muzzle the press when it runs mad; and to arrest and confine men, when they exhibit their traitorous proclivities. It is a question of life or death to the nation.

The civil power is inadequate, and the military must save it, or it perishes. By the exigency, the security of peace becomes incompatible with the danger of war; and the guarantees of the former give way to the necessities of the latter. This necessity brings into exercise the Executive discretion, under the war authority which removes the danger by the constitutional use of force.

Let us now examine some of these minor guarantees of the Constitution, and see how unsound much of the clamor against their alleged infraction has been.

"Congress shall make no law abridging the freedom of speech and of the press."

Mark the language,—*Congress* shall make no *law*.

The freedom of speech and of the press is vital in a republic, founded upon the will of the people and popular intelligence. It is therefore essential that Congress should be prohibited from encroaching upon this liberty, lest passionate majorities, in times of high excitement, should crush out the rights of the minority.

But does it follow because of this prohibition on the law-making power, that in time of war and great public exigency, any one may, with impunity, publish by mouth or by press, matter affording

information and encouragement to the enemy, spreading sedition, destroying confidence in the means of suppressing insurrection, producing dissatisfaction and mutiny in the army, and preventing enlistments?

To pass a law abridging the freedom of speech and of the press, is one thing, and to take military cognizance of an *abuse* of it, which directly thwarts the plans and destroys the ability of the Government to prosecute the war against the enemy, is a totally different thing. If they be one, then Congress even cannot, by reason of the constitutional barrier, pass a law to correct the abuse.

But it is clear, that whenever these abuses stand directly in the way of the exercise of the military powers delegated to suppress rebellion, and cause the laws to be observed, these powers, granted without proviso or restriction, rise superior to the obstacle and clear it from their path. Take an example.

An expedition is fitting out in New York harbor of momentous importance. The secret is wormed out by that omnipresent treason, which permeates every quarter of the North, and a New York paper publishes the destination and design, the number of vessels and forces, and everything useful to the enemy. Or perhaps the army is on the march, but at the very moment when success should crown its efforts, the plans are thus divulged; the enemy seizes his advantage, and our army is defeated and decimated.

Thus, every time the Executive arm is raised to strike the military blow, it is paralyzed. What civil remedy will compensate for disaster, restore life to the fallen dead, or replenish the captured stores? Yet all this wrong is done on loyal territory, where, it is said, no military authority can or will be permitted, from a want of constitutional power, to arrest the guilty author of disaster, and prevent its recurrence.

If it be true doctrine, that because the offender stands on loyal ground, when he blocks the wheels of war, and brings defeat on our arms, or paralyzes the efforts of suppressing force, and no power can be exercised under the military authority, the efforts of the Government may cease, for such a doctrine strikes down its ability to bring the war to a successful conclusion.

The right of search, seizure, and arrest has been much criti-

cized, and the sections of the Constitution relative thereto have found a place in the Message of the Governor of New York, to wit:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. And no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person to be seized."

"No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . . nor be deprived of life, liberty, or property, without due process of law."

I have already referred to the higher rights of life, liberty, and property, and shown that the necessities of war demand even their surrender when necessary, and that the lawfulness of their privation springs from the Constitution itself, whose powers are suited to the exigency. As a necessary conclusion, the minor guarantees of the Constitution cannot claim greater immunity, and therefore the inferior guards contained in the clauses just read must yield to the same overruling exigency, which demands that every right standing directly in the path of the exercise of the war powers must give way to them.

But the right of search and seizure is not forbidden in the Constitution, as ignorant or wicked clamor would have us suppose. It is only *unreasonable* search or seizure that is. The Constitution is not guilty of the folly of protecting individual right at the expense of public safety. The common law right of arrest still remains.

For example, arrests may be made without warrant by inferior officers, such as constables, and even by private persons. (See 1 Chitty, C. L., 15 to 22.) Every man present at the commission of a felony, or a dangerous wound, is bound to arrest the offender, under pain of fine and imprisonment, if he escape.

On *probable suspicion*, a *private* person may arrest where a felony has been committed, and probable ground of suspicion will protect him from an action. Where a felony has been committed, a constable may arrest a supposed offender on the informa-

tion of others, without a positive charge, and without a personal knowledge of the circumstances.

And (says Chitty, p. 21) a constable may justify an imprisonment, without warrant, on a reasonable charge of felony made to him; although he afterwards discharge the prisoner without taking him before a magistrate, and although it turns out no felony was committed by any one.

In the case of the United States *vs.* John Hart (1 Peters, C. C. R., 390), Judge Washington decided that, driving the stage containing the mail at a furious rate through the streets of Philadelphia, was a breach of the peace; and that, notwithstanding the Act of Congress against stopping the mail, and, I may add, the Constitution, upon the principles of the common law, the constable was authorized, *without warrant*, to prevent the peace from being broken.

But the constitutional provision itself has received a judicial construction in Pennsylvania, whose Constitution is nearly identical in terms. (Wakely *vs.* Hart, 6 Binney, 318.) Said C. J. Tilghman, one of the purest and soundest judges that ever graced the bench,—"But the plaintiff insists that, by the Constitution of this State, no arrest is lawful without warrant issued on probable cause, supported by oath. Whether this be the true construction of the Constitution is the main point in the case. It is declared in the 9th article, section 7, 'that the people shall be secure in their persons, houses, papers, and possessions, from unreasonable arrests; and that no warrant to search any place, or seize any person or thing, shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation.'

"The provisions of this section, so far as concern warrants, only guard against their abuse by issuing them without good cause, or in so general and vague a form as may put it in the power of officers who execute them to harass innocent persons, under pretence of suspicion; for, if general warrants were allowed, it must be left to the discretion of the officer on what persons or things they are to be executed." Now mark the language of the Judge: "But it is nowhere said that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to

commit murder or robbery must be arrested on the spot, or suffered to escape. So, although if not seen, yet, if known to have committed a felony, and pursued with or without warrant, he may be arrested by any person.

"And even where there is only probable cause of suspicion, a *private person* may, without warrant, at his peril, make the arrest. I say at his peril, for nothing short of proving the felony will justify the arrest." (That is by a private person on suspicion.) "These are principles of common law," says the Judge, "essential to the welfare of society, and not intended to be altered or impaired by the Constitution."

In the name of patriotism, public safety, and justice, can it be, that, when the mere property of an individual is invaded, a petty officer, on suspicion or bare information, may arrest without warrant; yet when treason, the highest crime against society and law, runs riot, when a dangerous rebellion and civil war are raging, and the very life of the nation endangered, the highest officer in the Government, armed with supreme authority to quell insurrection, and cause the laws to be executed; sworn, not merely to support, but to preserve, protect and defend the Constitution; cannot seize or imprison, without clear proof and judicial warrant, those who spread disaffection, cause mutiny, bring disaster on our arms, aid and abet rebels and traitors, and paralyze the very arm he is using to subdue rebellion!

Without further discussion, let me test the provisions of these clauses by an example or two.

In the loyal city of New York, a secret mail exists, and letters to rebeldom are sent by sea, or posted by land. The mail-bag is aboard the vessel, or has reached the shore of the Potomac. According to the doctrine of peace, the traitorous pouch cannot be searched, the papers cannot be seized, nor the postman arrested, until a warrant is issued in due form of law; by which time the vessel has sailed, or the carrier has crossed and delivered the mail. So a vessel may be in loyal waters filled with contraband of war; but the doctrine of loyal soil forbids its detention without due process of law.

Thus, illustration might be heaped upon illustration, of the protection these clauses of the Constitution quoted by Governor

Seymour, afford to the cause of the rebels, if they are to be construed by the doctrines of peace.

Let a peace view of the Constitution prevail, where the subject-matter arises on loyal soil, and the war powers lose all their efficacy. In a great domestic strife, such as this, whence does the arm of war derive its strength, its force to crush rebellion? Certainly, not from rebel territory. That may be the field of achievement; but its power comes from loyal ground. There the greatest injury may be done—there alone, can its losses be repaired? Those acts of disloyalty, therefore, though committed on loyal territory, which tend directly to defeat military action, or paralyze the suppressing force, must come under military cognizance, or the war powers of the Constitution sink into utter impotence and insignificance.

But it may be said, these illustrations are examples of a plain breach of loyalty, and the power to search, seize, and arrest in such cases, may be admitted. True, they are plain, and it is because they are so, they are put. The question is,—what constitutional power has the President, in the exercise of his military authority, to search, seize and arrest within loyal territory, and distant from the field of army operations? These illustrations prove the power, and this is the point of dispute.

If cases not so plain are put, they do not disprove the power, but simply question the soundness of the discretion which directed its exercise.

What though the President may have erred in some of the arrests made; what though his reasons for others have not been given; what though clamor has condemned, and partisan controversy used them for its purpose; indeed, what though the power has in some instances been abused: yet none of these destroy the power, nor disprove the military authority to search, seize, arrest and detain, in the exercise of a sound discretion to meet the exigency of war.

"The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

This prohibition is expressly limited to a time of peace; or when no public danger exists. It is solely a restriction on Congress to set aside the privilege of the writ in the absence of a

necessity. Its place in the Constitution, its context, its scope, and the exception prove this. But in a time of rebellion, the power to suspend is clear. If, therefore, Congress confer on the President war powers incompatible with the free privilege of the writ, and this express grant necessarily carries with it the military authority to arrest and detain for military purposes, which would be defeated by the unrestrained use of the writ, the privilege necessarily falls before the grant of power by Congress under the Constitution itself. In such case, in a time of rebellion, the President acts not in violation, but under the Constitution, in exercising the powers thus conferred by law. In this case, the only question which can arise, is as to the soundness of his discretion; or, in other words, has he abused the power conferred upon him?

This furnishes, also, an answer to the question,—If he possess constitutional authority, why is an act of Congress called in to protect him from prosecution? Precisely for the reason that the soundness of his discretion, not the power, becomes the subject of controversy. In a time of public danger, and high excitement, it is not fitting that an honest discharge of a delicate, but essential duty, should be subject to prosecutions calling for the divulging of the secrets of state, and subject to the irritation of misguided opinion or enmity.

Doubtful cases will render difficult the exercise of any power, however clear. Officers of the lowest grade, clothed with a sound discretion, are protected against honest errors of judgment. The President, therefore, should not be compelled to incur any unnecessary or unreasonable risk while acting for the public safety.

But the power to suspend the privilege of the *writ* of habeas corpus is quite a different thing from the lawfulness or unlawfulness of the *arrest*. If the *arrest* be lawful the *writ* cannot discharge. The authority of the President to arrest, like all other rightful authority, is lawful in itself when duly exercised. Whenever, therefore, he has the power to make a military arrest, his return is a full answer to the writ. Would it be competent to use the writ to discharge a rebel prisoner, captured with arms in his hands? Certainly not. But why? Simply because his military arrest and detention are lawful. But if another, away

from the battle-field, be arrested, and the order of the President asserts that he has been in treasonable intercourse with the enemy, or that his acts were about bringing disaster upon our arms, and his arrest is, therefore, necessary, what will the habeas corpus effect in this case? If the order of the President be not conclusive of the facts he asserts in this case, it is not so in the former; and in every case, the President must be ready with proof to sustain his exercise of military authority. The power to hold the rebel taken in arms, and his aider and abettor, to prevent disaster, is one and the same. It is, therefore, not difficult to see where the effort to suppress insurrection must end if the doctrine prevail that the habeas corpus, in time of rebellion, could be used to discharge from military arrest, regardless of the return made to it by the President. The truth is, the writ itself is ineffectual against the military order setting forth a proper case of arrest, although the privilege of having it may not be suspended.

A more difficult branch of the subject now presents itself, not intrinsically, but because of the sphere of partisan controversy within which it is found, and the bitterness attending its discussion. My purpose is to avoid the exciting aspects of the emancipation question, and to deal with it only in reference to the constitutional power of the President.

The first step will be to embrace clearly the true purpose and character of the emancipation clause of the Proclamation of September 22d, 1862. It reads thus: "And on the 1st day of January, A. D. 1863, all persons held as slaves within any State, or any designated part of a State, the people whereof shall then be in rebellion against the United States, shall be thenceforward and forever free; and the Executive Government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom."

What is the character of this executive order? A learned gentleman, who resigned a high judicial position under the Government, characterizes it as an executive decree for the repeal of valid State laws, and, assuming this as its true tenor, argues thence that it is not only above the powers of the President, but

beyond the authority of Congress. But this assumption is simply incorrect, and in violation of the spirit and language of the clause. How is an Executive order declaring free the slaves of States, the *people* whereof are in *rebellion*, a repeal of valid State laws? It is not a mere edict, but an act. Its purpose is to deprive rebellion of its means of support. In one sense, any capture or destruction of the property of a rebellious people at war with us defeats the State law, in so much that this law cannot protect the owner's title or possession.

But why does it not protect? Simply because the rebellion of the owner has made him amenable to a *superior* law. Within their proper sphere, the Constitution and laws of the United States are the supreme law of the land, so declared by the Constitution itself: "And the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Every military act, when done under the authority and laws of the United States, is founded in supreme authority; and rights protected by State laws, whenever they come in conflict with this superior authority, must yield to it. The only question, therefore, which can arise, is,—whether the Executive act is under and in pursuance of the authority vested in him to take care that the laws shall be faithfully executed, and to suppress rebellion. If it be, then the State laws give way, not by way of repeal, but because they are inferior in authority. Thus the logic is inexorable, and the conclusion inevitable, that, if the emancipation measure be a military necessity, the rights of property of the slave-owners of States whose people are in rebellion, must give way to the necessity which brings the Federal power into play, and which has for its purpose the preservation of the life of the nation, and the defence of the Constitution itself.

The right to slave labor is regarded, in the Slave States, solely as a right of property, no higher in character than other rights of property. As a mere question of property, it clearly opposes to the Federal authority no greater obstacle to capture or destruction. In applying to rebel property the Federal authority to capture or destroy, when this becomes a military necessity, there can be no difference as to the right of property, whether it is in slave labor, or in those articles which increase the ability

of the enemy to carry on the war. As a just measure of self-preservation, the belligerent destroys that which strengthens the power of the enemy to cope with him, or facilitates his military operations. He does not hesitate to burn bridges, or tear up a railroad, though it be the property of a private corporation, whose stockholders are women and minors.

Why then stigmatize the Proclamation as an attempt to *repeal* State laws, higher than the authority of Congress itself? Why not meet the point fairly, admit the fact shown by the tenor of the paper itself, that this is an endeavor, on the part of the President, to impress upon rebel slave labor the effects of Federal law, under an alleged military necessity to suppress rebellion, and then test the endeavor by the facts, to ascertain whether the Federal authority sanctions this exercise of power?

It is one thing to err in an honest attempt to exercise delegated power, but a very different matter, to arrogate powers not delegated to any department of the Government.

Again, the learned gentleman asserts the purpose of the Proclamation to set the slaves free, *because* a majority of the legal voters do not send representatives to Congress. It is singular that any dispassionate mind should wander so widely from the truth. The President does not propose to emancipate, *because* the people of the rebel States do not send representatives, but *because* the people, as such, the sovereign power of the State, have openly, by State acts, cast off allegiance, and the entire population is either in arms, or by their means supporting those in arms. In effect he says to this rebellious people, by his military order, "If you shall so far reacknowledge the Federal authority, as to send representatives to Congress, I shall consider this as the evidence that the military necessity which produced this order no longer exists, and it and all its consequences shall be withdrawn." How can any unprejudiced mind see in this an intention or an operation to set the slaves free, *because* the people will not send representatives? What is this representation in Congress but a condition—terms offered to the rebel States—the acceptance of which evidences that the exigency has ceased?

Another fault he finds is, that the Proclamation acts on loyal persons in the rebel States, that is, it does not except them. In

other words, he would have it defeat itself; for, as a military measure, to weaken the ability of the rebels to carry on the war, the exception would cripple its operation, rendering it uncertain and largely useless. He forgets, also, that the Proclamation refers only to those States whose people are in rebellion, and who, by State acts—acts of sovereign power—have cast off allegiance, and assumed to dethrone the Constitution, and dissolve the Union.

In what one of these rebel States, recognizing the Confederate Government only, do the owners of slaves fail to contribute to the maintenance of the power of the rebels to make war? Are there any of these so-called loyal persons, who withhold tribute from the usurping Government, or the product of the labor of their slaves from their armies?

If the order of emancipation be justified on the ground that it is lawful to strike down this grand power, servile labor, in the field, in the workshop, and on the fortification, which sustains the rebellion, and feeds its power to resist, then the misfortune that its effects alight upon the so-called loyal, falls within the same principle of military necessity which brings destruction and disaster to the innocent in other cases. It operates on them, not in spite of valid laws, but because the necessities of lawful warfare demand it.

Stripped of all false statements, the case comes back to the true test,—Is the Proclamation a military act, demanded by the exigency, as a military necessity, in the prosecution of the war?

The question is a vast one, having its arguments, pro and con; and it is not surprising that, in a field so large, many should be unable to discover its confines. But, one thing must be conceded,—that he whose whole heart and mind have been, for weary months, laboring throughout its whole extent, has a far greater knowledge of the facts which solve the question of necessity. Watching every movement; studying the effect of every operative cause; familiar with that knowledge, forbidden by public interest to be disclosed; treading in memory the bloody soil of many an adverse battle-field, and feeling, to his inmost soul, the rebukes which misfortune, infidelity, incompetency, treachery, and a thousand ills, have showered on his head,—surely he should best understand the necessity which produced

the order. We who stand outside, at most can but *suppose*, perhaps but *guess* at the grounds which justify it. My province is to illustrate the war powers of the Constitution, not to justify the President.

In stating the grounds, therefore, which I *suppose* may be those that actuated him, I am but advancing reasons which might justify the order of emancipation as a military necessity. There may be other and better, of which I know nothing.

How then stands the question of military necessity, so far as I can see it? For seventeen anxious months the strife had been going on. So far from subduing the enemy, victory had perched upon his standard, in many battles after May, 1862, and the armies of the Union were driven back in almost every quarter. Cincinnati and Louisville were threatened, Maryland invaded, and Pennsylvania hastily called to meet the coming foe, Washington was beleaguered and the second Bull Run disaster had left our army demoralized. This was at the middle of September. Nothing then was wanting but a successful raid in the rear of the Capital, severing it from the North, finished by a blockade of the Potomac, to cut it off from its supplies. The peril was imminent that the Government must surrender, or cut its way out with the loss of everything giving prestige to us as a nation.

The Governments of Europe looked on with eager eyes. Already it had been proclaimed that the North fought for dominion only, the South for independence. In other words, the former for power, the latter for her altars and her homes. This was the carefully inculcated idea abroad. These were the circumstances attending the deliberations which ushered in the Proclamation of the 22d of September. And though, at the date of its publication, the enemy had been forced, by the battle of Antietam, on the 17th, to recross the Potomac, the results were yet unknown; and he had crossed without the loss of a gun, retiring in order; while at Harper's Ferry the Federal loss had been immense.

How had the enemy obtained these advantages, with a less force and fewer means? He was united and secret in his movements. The North was divided and its plans revealed. The draught of war upon his fighting material left his labor untouched, while it drew upon the farm, the workshop and the factory of the

North. He occupied a territory so vast, so chequered with difficulties, war upon the grandest scale had failed to conquer it. His army was relieved in the entrenchments and on the fortifications by the labor of slaves. Cut off from his usual source of supply, by land and sea, it was thought want would reduce him, and compel him to submit; but again slave labor interposed to save him. The slave toiled in the field, the workshop, and the factory; and bread, munitions, and arms flowed in ample supplies to his armies and his people. But who was this slave? A traitor? No—he had not rebelled. His instincts were for liberty, and taught him to look northward for its advent. He was loyal to the Union, though he had received but little for his love. Loyal himself, yet his labor had been prostituted by disloyalty, and had served the rebel purpose, sustaining it, when otherwise it must have fallen before the power of the Federal arms.

Here is a grand element of involuntary power, harnessed to the car of war by rebellion, and guided by treason. Here the military question arose.

Rebellion cannot be conquered (as it then seemed in the gloom which shrouded the Capital, and filled Pennsylvania with fear), until this element of power shall be extirpated. It stands in the road of our arms, and as a military necessity, it must be removed. Can it be detached? can it be so reached and influenced as to leave the enemy weak and prostrate without it?

This was the grave question to be solved at that dark hour. We can imagine the President communing with himself, thus:

"I see, with a clearness I cannot avoid, what it is true I have long known, but which, from reasons of policy, I have thought it unwise to touch, that this is the grand basis of Southern power, which, so long as it continues, must support the rebellion, and increase the difficulty of subduing it, while the energies of the North are becoming wasted in the struggle.

"If I can inspire it with a hope of liberty, rendering it restless and uneasy, causing it to refrain from labor, and to demand the wages of freemen, and thereby requiring greater vigilance at home, recalling men from the ranks, and preventing a conscription of the entire fighting population. If I can detach it, wherever the progress of the Federal arms can reach it, by withdrawing from it, as the chief executive, the Federal

protection hitherto accorded to it, I then accomplish more than the armies have done, or seem likely to do. I strike also a chord in the European heart, that will vibrate to the touch, and take from the war, the condemnation of a mere contest for power, putting farther off recognition, and rendering it more difficult.

"As the chief executive I will say to the slave, 'You are free, and the military and naval forces under me, shall, respect your right to liberty, and shall throw no obstacle in the way of your attempts at actual freedom.' His loyal heart, filled with a hope hitherto repressed, will take fire from the altar of liberty. He will throw down his shovel, his axe, and his hoe, and refuse to labor as before. The loud knocking at the Southern door, produced by the slave, in his restlessness, uneasiness, and attempts to escape, and the pecuniary loss it threatens, will alarm the Southern heart, and it will eventually grasp at the blessing of peace, and reacknowledge its fealty by a return to the halls of Congress."

This is the true character of the emancipation clause. It was an Executive effort to detach from the rebel cause the involuntary labor which fed and supported it. If successful, the rebellion must fail. The act was military, for it struck directly at the source of the enemy's supplies. It does not assume to legislate; it does not affect to repeal State laws.

In effect, it is an offer of amnesty, an Executive appeal to the slaves, as persons, to abandon the cause of rebellion, and accept the protection of Government, in order to divert their forced labor from the support of treason. As a means then seeming, in time of national gloom and adversity, to be absolutely essential to the preservation of the Union and the life of the nation, it was proclaimed as a military act to meet the exigency. As a military act, it thus falls within the *carte blanche* of military power conferred upon the President, for the purpose of suppressing the rebellion and causing the laws to be faithfully executed. Whether it will prevail or fail, it may be difficult to foresee. It may turn out to be an error, and may not accomplish the good it promised; but it is not the less justifiable in point of legality and authority, and cannot, therefore, be pronounced a usurpation of power.

The act is now past recall, and it is our duty, when the necessities of war demand all our loyalty, to trust that it will at last prove its wisdom as well as its lawfulness. If not, it is at most an error in the exercise, not an assumption, of the power.

The Proclamation of the President of the 24th of September, is also the subject of criticism and censure. The complaint against it is, that it declares new offences, unknown to the laws, and proclaims martial law in the North, where no necessity prevails.

But, what says the Proclamation itself? After reciting that "disloyal persons are not adequately restrained by the ordinary process of law from hindering" the draft of the militia, "and from giving aid and comfort in various ways to the insurrection," it proceeds: "Now, therefore, be it ordered, that during the existing insurrection, and as a necessary means for suppressing the same, all *rebels* and *insurgents*, their *aiders* and *abettors* within the United States, and all persons discouraging volunteer enlistments, resisting the militia draft, or guilty of any disloyal practice, affording *aid and comfort* to the *rebels* against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commissions."

It will hardly be contended that rebels, insurgents, their aiders and abettors, are subject to no military cognizance, in a time of dangerous war. But is there a better reason for excluding from the same authority, persons discouraging volunteer enlistments, or resisting the militia drafts, or guilty of disloyal practices, affording aid and comfort to the rebels, and against the authority of the United States? What is the crime of the rebels? Resistance to the laws. What the lawful means of overcoming this resistance? Calling out the militia of the States, volunteer or drafted. What is the discouragement of the enlistment, or resisting of the draft? A direct interference with, and obstruction of the law calling out the militia to suppress the rebellion, and to cause the laws to be faithfully executed. What is a disloyal practice, affording aid and comfort to the rebels, and against the authority of the United States? Treason and participation in the rebellion. Remember the language of C. J. Marshall. No

matter how minute his part, or how remote from the scene of action, if leagued with the rebels, he is a traitor.

What then is the substance of the whole objection? That treason and insurrection may be rampant—that full power by law may be given to quell it by military means. But that if this military means be frustrated by disloyalty, it has no power of self-preservation. Was there ever an objection so suicidal of national life and contrary to sound reason! The President, by the Constitution and the law, is bound to take care that the laws shall be faithfully executed; but how are the laws for enlistment and drafting to be duly executed, if they may be obstructed in their execution, and the President have no power to enforce them, in a state of war and emergency? And in what respect does obstruction to these laws in the North differ from obstruction to other laws in the South.

But it is said there can be no emergency in the affairs of a people, wherein martial law can be declared beyond the limits of a particular district, and away from the actual field of army operations.

Therefore,—says Governor Seymour, in his late message, "Martial law defines itself to be a law where war is. It limits its own jurisdiction by its very term." A very good definition, but wanting in the very marrow of it, when it comes to the application. "Where war is." But where is war? Where are its effects, its influences, and its sources of supply? Is it where men are fighting only, or is the *nation* at war, the North on one side, the South on the other? It is one section against the other. If Northern soil has not deeply felt the iron tramp of Mars and the horrors of conflict, it is its good fortune; not because his banner does not float over it. In its Federal aspect, ours is a nation, one and indivisible, and this is a civil war involving its entirety. "When in a republic (says Vattel, § 292) the nation is divided into two opposite parties, and both sides take up arms, this is called a civil war." "A civil war (says he) breaks the bands of society and government, or at least suspends their effect; it produces in the nation two independent parties, who consider each other enemies, and acknowledge no common judge." It is not where the ring of the musket, and the roar of cannon are heard, that war is only; but its field of operations covers the

whole domain of the nation. The disloyalist, who fills a vessel in New York harbor with arms for the South, on a trial for his treason, would find no pretext to save him, because the clangor of arms was not heard north of the Potomac.

Doubtless the Governor, in his definition of martial law, would confine it to the narrow limits of army operations. But arms, munitions, and men, must come from a wider field; the power to call forth the army to battle must precede the fight; and must be a dead letter, if it be vigorless to deal with those who obstruct its execution. Then the sphere of war, in its acts, its influences, and its resources, is wider, extending over North and South.

Can it, therefore, be maintained that martial law cannot be declared on loyal soil?

Cincinnati was the theatre of martial law. There it was not the character of the soil, but the extent of the necessity, which justified.

The power to wage war carries with it the authority to declare martial law. It is a need of warfare, and he who carries it on must judge of the necessity. To other minds the necessity may not appear; still it belongs to him who has the right to declare it. The necessity is the mischief which this law is intended to remedy. The extent of the territory over which it operates must, therefore, be coextensive with the mischief it seeks to remove.

But the language of the Proclamation has been disregarded. It is untrue that martial law has been declared in a general sense over loyal States.

The civil law still prevails over all the North. The President has declared martial law only as to specified persons, and specific acts. It is only against rebels, insurgents, their aiders and abettors, and persons discouraging volunteer enlistments, resisting the militia drafts, and guilty of disloyal practices, affording aid and comfort to the rebels, against the authority of the United States. The purpose is to prevent the defeat of the very means put into his hands to suppress the rebellion. He cannot conquer without an army. He cannot call men to arms without power to compel them to come; and he cannot maintain discipline if outside interference prevail.

This is no ordinary case of war, where the necessity for martial law limits it to narrow confines. The antecedent relations of the two sections scattered the brands of disaffection all over the North. Treason, like a cutaneous disease, has spread over the population the virulent pustules of disloyalty, and many lie so hidden beneath the surface the most vigilant scrutiny cannot detect their presence.

Is this war to endure always, or to end disastrously? or must disaffection lurk in our midst, poisoning the streams of national life, and paralyzing the arm of force? Surely there is a power in military authority to extend the area of martial law, coequal to the field of mischief it is required to remedy. The true patriot, the philanthropist, the loyal man, never can doubt it.

In conclusion, I trust I have kept within the limits assigned to this dissertation; to discuss only the powers of the Constitution, whether they relate to secession as treason; the right of military arrest; its effect upon the writ of habeas corpus; military emancipation; or the power to declare martial law on loyal soil. Whether these powers have been exercised arbitrarily or justly I have left unsaid. Time and the voice of truth, when the feelings and impulses of the hour are past, will disclose their real character. If the President have erred, still few have doubted his integrity of purpose and loyalty of heart.

O, how grand is the spectacle of an upright man breasting the pitiless storm of misfortune, injustice, and passion, in the discharge of high and holy duty! The fate of a great nation hangs suspended on his arm; and with his face turned upward toward heaven, as if to scrutinize the decrees of the Providence above, he stands, nobly determined to sustain and lift it above all human effort to destroy. Millions look to him for safety, and he feels the awful weight of responsibility crushing him almost to earth. But, with faith unmoved, hope, renewed, "springs eternal in his breast," and he marches onward to the goal of duty,

> "As some tall cliff, that lifts its awful form,
> Swells from the vale, and midway leaves the storm,
> Though round its breast the rolling clouds are spread,
> Eternal sunshine settles on its head."

And thou, my country! shall there be no hope for thee? Must thy light go out forever,—that light, which shone upon the past, like a beacon-fire to the tempest-tost, to guide our race to a peaceful rest? Can it be, that here, in this land of freedom and equal rights, disloyalty and treason will sap thy deep foundations? that the fabric of Free Government, so carefully wrought by patriotism and cemented in blood, shall fall into ruins, and, like a mound of moss-grown stones, marking some old and long-forgotten grave, thy ruins shall serve only to point to the last resting-place of Freedom and Republican Government?

But O, kind Heaven, forbid this end! And rather let me behold that hour, when, crowned with victory, the full-orbed sun of Freedom, rising upon the field of strife, and bursting the folds of battle, shall roll the storm of war away, and, pouring his effulgent rays upon a happy and reunited people, shall flood this Union with one full stream of Liberty and Love!

on any other condition. That errors will be committed, errors of judgment certainly, errors of purpose perhaps, on the part of individuals, is sure to happen in all wars. Commanders of armies, members of cabinets, members of Congress, Generals, Secretaries, and Presidents, are fallible men, subject to like passions as we are. I do not at all deny, that it is our right and duty to watch and criticize their conduct, but we must not forget that critics, editors, and orators, are also fallible. While we sit in quiet and safety by our firesides, and inveigh against those who bear the heat and burden of the day; who carry upon their shoulders the thankless burden of official duty, and the heavy responsibility of results, which often depend on the elements and on casualties beyond human control, we must keep in mind that we also have our interests, our prejudices and our passions, and that it is much easier to find fault, than to pursue any course of conduct which will escape censure in a fault-finding community. There are two ways of doing everything; and when duty constrains us to find fault with the shortcomings of our rulers and our generals, we should, if possible, do it in such a manner, as not to give aid and comfort to the rulers and generals of the enemy.

But it may be asked again, how can we support an Administration which adopts measures that we deem unconstitutional? I should certainly be a very unfaithful pupil of the political school in which I was trained, if I could ever hear the sacred name of the Constitution justly invoked, without respect, or yield to it anything less than implicit obedience. It is, however, as great an error to appeal to it where it does not apply, as to disregard it where it does; and I must say that the study of our political history ought to teach us caution in this respect; for, from the formation of the Government in 1789 to the present day, there has not been an important controverted measure,—no, not one,—which its party opponents have not denounced as unconstitutional. It is one of the doctrines of the seceding school, that the government of the United States could not constitutionally wage war against a sovereign State. But how if the sovereign State strikes the first blow, fires on your vessels, bombards and captures your forts, threatens your capital, and invades the loyal members of the Union who refuse to join in the war of aggression? Few, I suppose, will doubt that the United States may constitutionally wage a war of self-defence against any enemy—domestic or foreign. But in waging this war of self-defence, we cannot, in the opinion of some persons with whom I have usually acted, and whose judgment I greatly respect, go beyond the powers specially granted by the Constitution to the General Government, for the purposes of ordinary administration in time of peace. This opinion seems to me to rest on a misconception of the authority under which war is waged. The Constitution authorizes Congress to declare war, to raise and support armies, and to provide and maintain a navy, and it clothes the President with the power of commander-in-chief. It goes no further. It prescribes nothing as to the enemy against whom the measures, by which, nor the ends for which the war may be carried on. It gives no more power to wage war with a foreign State, than with a domestic State; and it is as silent on the subject of blockading the ports, as of seizing the cotton or of emancipating the slaves of a district in rebellion. The rights of war belong to the more comprehensive, in some respects the higher code, of international law, to which not the govern-